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Supreme Court, U.S.
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No. 07-_____

in the
Supreme Court of the United States

Patrick Neil Sweeney,
Petitioner
v.
Department of Homeland Security,
Respondent

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a Fourteenth Amendment issue concerning due process. The following questions are presented:

1. Is an agency obligated to reveal exculpatory evidence?

2. Is an agency obligated to prove each element of a charge containing elements?

3. Does an inability to prove retaliation establish preponderant evidence that an agency did not retaliate against a whistleblower?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 5 USC § 1221, Individual right of action in certain reprisal cases, provides, in relevant part:

> ...if the employee, ... has demonstrated that a disclosure described under section 2302 (b)(8) was a contributing factor in the personnel action which was taken ... against such employee,.... The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—
> (A) the official taking the personnel action knew of the disclosure; and
> (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.
> (2) Corrective action under paragraph (1) may not be ordered if the agency **demonstrates** (emphasis added) by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

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JURISDICTION

The judgment of the court of appeals was entered on May 14, 2007 (App. A), The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress enacted the Whistleblower Protection Act to protect Federal employees from retaliation for disclosing wrongdoing. Personnel actions taken briefly after a disclosure were justified only by clear and convincing evidence that an action would have proceeded despite any earlier disclosure. The Merit Systems Protection Board (MSPB) has departed from Congressional intent.

This Court has long held that exculpatory evidence cannot be suppressed. The MSPB has departed from such precedent.

BACKGROUND

Sweeney was employed as a senior special agent for the Immigration and Customs Enforcement,

a sub-agency of the U.S. Department of Homeland Security ("DHS") ("agency") from September 1990 through March 2006. On January 13, 2005, the Assistant Special Agent in Charge, Gene D. Lowery, proposed Sweeney's removal on two charges: first, failure to follow instructions; and second, failure to properly secure evidence. On June 30, 2005, the agency imposed a penalty of a 30-day suspension, effective July 5, 2005. The charges arose from Sweeney's interaction with a confidential informant ("CI"), his processing of a moiety claim (a type of reward payment for information) and his possession of certain compact disks (CDs) relating to a child pornography investigation.

The agency charged that on February 17, 2004, Sweeney met the CI, alone and without supervisory permission. Id., slip op. at 2-3. Special agents are required to abide by certain rules set forth in the Special Agents Handbook. Chapter 41 of the Handbook states in part that "controlling agents will not meet or debrief informants without another law enforcement officer in attendance unless they obtain

supervisory approval." Sweeney v. Dep't of Homeland Sec., DA-0752 [redacted] 0534-1-2, slip op. at 2 (M.S.P.B. May 5, 2006).

The agency charged that on April 6, 2004, Sweeney encountered the same CI in the parking lot of the DHS building in Houston, Texas and spoke with that CI in violation of a March 22, 2004 instructions from Group Supervisor J. Stephen Coffman to not contact that CI, and, if contacted, refer the CI to Coffman. Id. at 3-4. Coffman claimed to witness the encounter and telephone Sweeney several times. Coffman further claimed Sweeney failed to report immediately after being ordered to report immediately. The agency also charged that Sweeney accepted two telephone calls from the CI; one on April 5, 2004 and another on May 17, 2004, during which he remained connected for several minutes.

The agency charged that Sweeney failed to complete a moiety claim by the close of business on March 26, 2004 as instructed by Coffman. Coffman

alleged he was forced to re-assign the moiety claim to another employee, Jennifer Havies, who ultimately prepared the claim several months later.

That agency charged that on March 26, 2004, Coffman found two CDs containing evidence relating to a child pornography investigation on Sweeney's desk in violation of certain agency procedures regarding evidence. Coffman claimed to have confirmed that these discs contained images of child pornography with a Forensic Computer Special Agent named James Martin. Coffman prepared a memorandum detailing his allegations concerning the CDs on March 29, 2004.

The agency imposed a 30-day suspension which Sweeney appealed the MSPB. The appeal was heard by ALJ Sidney Cornelius assigned to Dallas, Texas. At the hearing, Sweeney claimed he had permission from an acting supervisor to meet with the CI on February 17, 2004; that he was obligated to listen to the CI on April 6, 2004 because he believed the CI was reporting a crime at the time; that Coffman's order of March 22, 2004 allowed him to

speak with the CI in order to refer the CI to Coffman; that all other evidence than Coffman's testimony proved he completed the moiety claim as assigned; that there were no child pornography images on CDs he possessed; and, that Coffman fabricated evidence and made false allegations concerning the CDs. Sweeney raised an affirmative defense that Coffman made these false allegations in retaliation for Sweeney's disclosure of October 20, 2004 that Coffman misused his position for personal benefit.

On May 5, 2006, the ALJ determined that the DHS had established by preponderant evidence that Sweeney failed to follow instructions or properly secure evidence and sustained the charges and penalty. Id. at 2-10. The ALJ found Sweeney to be less credible than every agency witnesses and found that Sweeney had not provided any evidence to corroborate his assertions (Emphasis added). Id. at 3, 5, 8, 10. The ALJ rejected Sweeney's affirmative defenses; finding that Sweeney failed to prove the action was taken in retaliation for whistleblowing or that the agency committed harmful error. The ALJ

concluded the penalty imposed was reasonable and promoted the efficiency of service. Id. at 15. Sweeney sought review by the full Board which denied his petition. See 5 C.F.R. § 1201.113(b) (2006). Sweeney timely appealed to the U.S. Court of Appeals for the Federal District which affirmed on May 14, 2007.

The Appeals Court agreed that the Board properly sustained both charges, finding that; the ALJ's conclusions that Sweeney failed to follow instructions, left evidence in his desk in a manner contrary to agency procedures, and failed to prove his affirmative defenses were all supported by substantial evidence.

That Court claimed the record showed Sweeney admitted he failed to follow instructions by speaking to the CI alone and not completing the moiety claim; that Coffman, as well as Havies, testified that Sweeney failed to meet the deadline for completing the moiety claim; that substantial evidence existed in the record to support the ALJ's determinations concerning Sweeney's affirmative

defenses; and, that Sweeney's allegation about government's counsel tampering with a potential witness was not raised and was unsupported by the record.

REASONS FOR GRANTING THE PETITION

1. The agency withheld exculpatory evidence.

The ALJ, an agent of the Federal Government, allowed all exculpatory documentary evidence to be withheld and then relied solely on Government witness testimony which he found credible in every instance. Because the ALJ conducted a hearing where exculpatory evidence was suppressed, the only testimony found credible was government witness testimony and precedent precludes judicial review of credibility determinations, Sweeney was denied any realistic due process or equal protection under the law.

The Federal Rules of Evidence: Rule 106, Remainder of or Related Writings or Recorded

Statements, requires that when part of an act, declaration, conversation, or writing is given in evidence by one party, such other parts of the act, declaration, conversation, or writing, as are necessary in fairness to a complete understanding of the parts admitted will also be admitted. This Court has previously found a duty on the part of the Government to release evidence when suppression of that evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." (See *United States v. Agurs*, 427 U.S. 97 (1976)

The agency withheld time and attendance documents for Coffman, Sweeney's supervisor, and Daniel Robb, Sweeney's acting supervisor on February 17, 2007. These documents would have proved Robb was acting supervisor that day and the individual who gave or withheld permission for Sweeney to meet with the CI alone. The agency attorney acknowledged that Robb was the supervisor on February 17 when providing hearsay testimony that Robb could not remember allowing a meeting between just Sweeney and the CI as prelude to a question in direct examination of Sweeney.

The agency withheld documents concerning the moiety claim proving Coffman received a completed moiety claim before March 26, 2004 and that the moiety claim charge was a false allegation. The MSPB hearing record showed Sweeney completed the moiety claim in that the agency attorney read investigative case notes into the record recording when Coffman instructed Sweeney to record completion of the moiety claim on March 26, 2004 and showed Havies testified that her knowledge of the moiety claim was limited to what Coffman told her.

The agency withheld documents concerning the alleged CDs containing child pornography proving there were no child pornography images on any disks related to the investigation, that the suspected child pornographer was not indicted, and that the CDs Sweeney held and later transferred to another agent were destroyed in 2004.

The agency withheld documents concerning Sweeney's alleged failure to report "immediately" on April 6, 2004 proving Coffman made that false allegation after the CI refused to cooperate with

Coffman in exchange for a full moiety claim payment when Coffman alleged Sweeney accepted bribes. Documents suppressed by the agency reveal the CI was later denied any moiety claim payment based upon the false allegation that the CI withheld a previous felony conviction from the agency when becoming a CI.

The agency withheld documents concerning disclosures Sweeney made on October 20, 2004; admissions of guilt by Coffman regarding those disclosures; threats Coffman made about killing Sweeney in July 2004 because Coffman believed Sweeney instigated a Department of Justice investigation into Coffman's relationship with the daughter of an indicted child pornographer named Thomas Thompson; and, results of an agency Office of Professional Responsibility investigation into disclosures made by Sweeney.

This Court found In *Kyles v. Whitley*, 514 U.S. 419 (1995), that if the state fails to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a conviction cannot stand if there is a reasonable probability that the

evidence, considered cumulatively, would have produced a different result at trial. The Court in *Kyles* also held that once a petitioner establishes the "reasonable probability" of a different result, the error cannot subsequently be found harmless. *Kyles*, 514 U.S. at 436. In *Strickler v. Greene*, 527 U.S. 263 (1999), this Court (applying the *Kyles* standard) found that a failure to show reasonable probability that an outcome would have been different if non-disclosed exculpatory evidence were available does not preclude the Government's responsibility. In *Banks v. Dretke*, 540 U.S. 668 (2004), this Court held that suppression of evidence constituted "cause" for petitioner's failure to present such evidence.

This Court's decision in *Brady* was clarified further by *United States v. Agurs*, 427 U.S. 97 (1976), where a defendant's failure to request favorable evidence did not leave the Government free of all obligation. This Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that trial testimony was perjured; second, where the Government failed to accede to a defense request for

disclosure of some specific kind of exculpatory evidence; and third, where the Government failed to volunteer (emphasis added) exculpatory evidence never requested, or requested only in a general way.

In *United States v. Bagley*, 473 U.S. 667 (1985), this Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and abandoned any distinction between the second and third *Agurs* circumstances, holding that, regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A showing of materiality does not require preponderant evidence that disclosure of the suppressed evidence would have had a different result. *Bagley 's* touchstone of materiality is only that there is a "reasonable probability" of a different result. A "reasonable probability" of a different result exists when the government's evidentiary suppression could reasonably undermine confidence in the verdict. There is no need to demonstrate that

there would not have been enough evidence left to convict, just that there would be the possibility of an acquittal. *Bagley* materiality was also to be considered collectively, not item by item.

Unless the MSPB and Federal Circuit review is to descend to a gladiatorial level unmitigated by any obligation for the sake of truth, the Federal Government should not intentionally fail to make timely disclosure of the existence of all evidence or information which tends to negate guilt or mitigate the offense charged or which would tend to reduce the punishment. While the government is left with a degree of discretion, there is a corresponding burden. An agency, knowing what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. There should exist a duty to acknowledge favorable evidence and culpability for failing to disclose known, favorable evidence that is inescapable.

2. The agency failed to prove each element of each charge by preponderant evidence.

While nothing in law or regulation requires labeling a charge of misconduct, if an agency chooses to label misconduct, then it must prove all of the elements of the substantive offense with which an individual is charged. (See, e.g., *Campbell v. Department of Transportation*, 15 M.S.P.R. 92, 103 (1983), aff'd, 735 F.2d 497 (Fed.Cir.), cert. denied, 469 U.S. 881, 105 S.Ct. 247, 83 L.Ed.2d 185 (1984); *Boykin v. U.S. Postal Service*, 51 M.S.P.R. 56, 58-59 (1991), *King v. Nazelrod*, 43 F.3d 663, 666 (Fed. Cir. 1994), *Johnson v.. Department of Justice*, 65 M.S.P.R. 46, 50 (1994), dismissed, 48 F.3d 1236 (Fed.Cir.1995), *Chauvin v.. Department of the Navy*, 38 F.3d 563, 565-66 (Fed.Cir.1994).

The agency charged that on February 17, 2004, Sweeney met with a CI alone and without the permission of his supervisors. (See *Sweeney v. Dep't of Homeland Sec.*, DA-0752-05-0534-1-2, slip op. at 2 (M.S.P.B. May 5, 2006).) The agency; therefore, should be obligated to prove the two elements: (1) "met alone on February 17, 2004" and (2) "without permission". Sweeney admitted the first element, leaving the agency to prove the second element of the

charge; that Sweeney did not have permission to meet the CI alone on February 17, 2004. The agency failed to offer any evidence. The agency attorney only provided hearsay that the acting supervisor, Robb, "could not remember" giving or denying permission.

The agency charged Sweeney with accepting two telephone calls from the CI in violation of instructions from the supervisor. It should follow that the agency could prove the two elements (1) Sweeney accepted telephone calls and (2) that accepting these telephone calls violated an instruction. Sweeney admitted the first element, leaving the agency to prove Sweeney was barred from accepting telephone calls from the CI. The agency failed to do this. Since part of the supervisor's instruction required Sweeney to refer the CI to Coffman if contacted, permission to accept telephone calls in order to refer the CI to Coffman was inferred.

Sweeney's interpretation of Coffman's ambiguous instruction regarding accepting any telephone calls: that he should refer the CI to Coffman if contacted, falls within permissible

behavior established by precedent. The MSPB previously held in *Ruch v. Dep't of the Interior*, 18 M.S.P.R. 674, 676 (1984) that an employee did not violate instructions if those instructions were ambiguous and an employee did not violate instructions by acting in a way that an instruction could be interpreted.

3. The agency failed to prove by preponderant evidence that it would have taken the personnel action irregardless of the prior disclosure.

The ALJ found Sweeney's failure to prove the personnel action was taken in retaliation for purported whistleblowing activities or that the agency committed harmful error constituted preponderant evidence that no retaliation had taken place. The Appeals Court found that substantial evidence existed in the record; without identifying what the substantial evidence actually was, to support the ALJ's determinations concerning Sweeney's affirmative defenses.

Federal regulations stipulate that an agency needs to prove its case by a preponderance of the evidence; the "...degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56(c)(2) (2001). Therefore; an Appeals Court review should determine whether, considered as a whole, the evidence provided is sufficient to meet the evidentiary burden applicable to a particular case. (See *Bradley v. Veterans Admin.*, 900 F.2d 233, 234 (Fed. Cir. 1990)). The question is not how an Appeals Court would rule upon a de novo appraisal of facts of a case, but whether an administrative determination is supported by substantial evidence in the record as a whole. (See *Hayes v. Dep't of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984)). An Appeals Court review should determine whether substantial evidence exists to conclude the agency proved its case, not whether Sweeney could prove one thing or another. To do less reverses the burden of proof back on Sweeney and denies Sweeney due process. The Appeals Court, in this instance, seems to say that

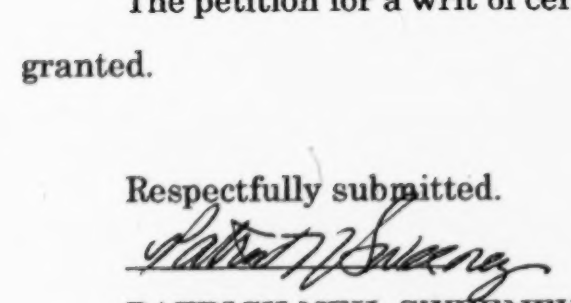
Sweeney's inability to prove a fact is a reason enough to believe him guilty.

An Appeals Court review has been held to be "whether the conclusion that the agency proved the charge against petitioner by a preponderance of the evidence is supported by substantial evidence." (See *Dixon v. Dep't of Transp.*, 8 F.3d 798 (Fed. Cir. 1994)). In addition: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." (See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 95 L. Ed. 456, 71 S. Ct. 456 (1951) and *Spurlock v. Dep't of Justice*, 894 F.2d 1328, 1330 (Fed. Cir. 1990)). If the evidence is so sparse that a reasonable fact finder would not find the charge proved by a preponderance of the evidence the Board must be reversed. The agency presented no evidence beyond witness testimony which the ALJ found credible, clear, and convincing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



PATRICK NEIL SWEENEY

AUGUST 5, 2007